

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME DAVON STEVENSON,

Defendant-Appellant.

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UNPUBLISHED

April 14, 2005

No. 253752

Muskegon Circuit Court

LC No. 02-047633-FH

Before: Neff, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(b). He was sentenced to concurrent terms of 10 to 22½ years' imprisonment. We affirm.

Defendant's convictions arise from the sexual assault of an acquaintance. Testimony at trial indicated defendant either offered, or the victim asked him for, a ride home from a friend's house. The victim accepted an invitation to defendant's house, where they drank and the victim smoked marijuana. The victim agreed to stay the night after defendant told her that he was too drunk to take her home. After she had gone to bed in a separate room, defendant entered the room and began touching her. The victim testified that despite her protests, defendant forced her to engage in vaginal, oral, and anal intercourse. Defendant maintained that their sexual activity was consensual.

Defendant first argues that he was denied a fair trial because the trial court allowed the prosecutor to conduct improper voir dire. We review the scope and conduct of voir dire for an abuse of discretion. *People v Tyburski*, 445 Mich 606, 618-619; 518 NW2d 441 (1994).

In *Tyburski*, *supra* at 618, our Supreme Court stated,

[a] defendant who chooses a jury trial has an absolute right to a fair and impartial jury. *Duncan v Louisiana*, 391 US 145; 88 S Ct 1444; 20 L Ed 2d 491 (1968); *People v Miller*, 411 Mich 321, 326; 307 NW2d 335 (1981). The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury. *People v Brown*, 46 Mich App 592, 594; 208 NW2d 590 (1973) [, *aff'd* 393 Mich 174; 224 NW2d 38 (1974)]; *People v Harvey*, 167 Mich App 734; 423 NW2d 335 (1988). In voir

dire, meaning "to speak the truth," potential jurors are questioned in an effort to uncover any bias they may have that could prevent them from fairly deciding the case. It is the only mechanism, and the only safeguard a defendant has, for ensuring the right to an impartial jury.

We conclude that while the prosecutor's questions were overly specific, they were intended to explore the potential jurors' views regarding the issues that might arise in the case, and were asked for the proper purpose of determining whether the jurors could be fair and impartial. We are satisfied that the questions did not cause the jury to be biased in favor of the prosecution. Further, the trial court twice instructed the jury that their verdict must be based upon the evidence presented at trial. We find no error.

Defendant next argues that the trial court erred in allowing him to be impeached with evidence of his prior conviction of the crime of unauthorized use of a motor vehicle under Texas Penal Code § 31.07. Defendant contends that his prior conviction did not contain an element of theft that would render it admissible under MRE 609(a)(2). We disagree. We review the trial court's decision to allow impeachment with a prior conviction for an abuse of discretion. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995).

Prior convictions may be used to impeach a witness' credibility if the convictions satisfy the criteria set forth in MRE 609. *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). MRE 609 provides, in part:

(a) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and

(1) the crime contained an element of dishonesty or false statement, or

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

Crimes of theft are minimally probative, and are thus admissible only if the probative value outweighs the prejudicial effect. *People v Allen*, 429 Mich 558, 595-596; 420 NW2d 499 (1988). Defendant's prior conviction contains an element of theft or dishonesty. This Court has held that MCL 750.414, which is similar to § 31.07, is a crime involving dishonesty. *People v Hayward*, 127 Mich App 50, 59-64; 338 NW2d 549 (1983). In addition, although the crime is not strongly probative of truthfulness, it is minimally prejudicial because of the lack of similarity between the prior conviction and the charges in the present case. We find no error.

Defendant also argues that the prosecutor committed reversible error when he vouched for the victim's credibility during his closing argument. We disagree. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Prosecutorial misconduct is decided case by case, and this Court must consider the relevant part of the record and examine the prosecutor's remarks in context. *Id.* at 272-273. The propriety of a prosecutor's remarks depends on all of the facts of the case, and must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Prosecutors are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), quoting *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). They are given wide latitude and need not confine their arguments to the blandest of all possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). However, a prosecutor may not argue for conviction based upon the prestige of his office or an opinion of the police that a defendant is guilty. *People v Stacy*, 193 Mich App 19, 37; 484 NW2d 675 (1992).

A prosecutor "cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Bahoda, supra* at 276. However, a prosecutor is allowed to comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004); *People v Flanagan*, 129 Mich App 786, 796; 342 NW2d 609 (1983). Here, the prosecutor did not imply any special knowledge on his part or reliance on the prestige of his office. The prosecutor comments, could, however, be understood as improperly implying that the police had some special ability to determine that the victim had been truthful. Taken in context, we conclude that the import of the comments was that at the time the victim reported the assault, she was upset and seemed to others to actually have been sexually assaulted. Viewed in this light, the prosecutor's statements were based on testimony elicited at trial, and within the latitude a prosecutor is given to make arguments.

Defendant also raises several claims of error regarding the scoring of his sentencing guidelines. The scoring of a particular sentencing factor is a question of fact that is reviewed for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). A sentencing court has discretion in determining the number of points to be scored under an offense variable. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We uphold a sentencing court's scoring decisions where there is any evidence in the record to support them. *Id.* At sentencing, defendant challenged the trial court's scoring of Offense Variable 7 (OV 7). Because defendant's other scoring challenges are unpreserved, we review them for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Defendant argues that the trial court erred in scoring OV 7. This variable requires a trial court to score fifty points if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). The statute defines "sadism" as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). The trial court's assessing defendant fifty points for

OV 7 was adequately supported by the testimony. The assaults took place over a prolonged period of time, and defendant persisted despite the victim's requests to stop. Defendant told the victim that he would hit her with a vase, knock her out, lock her in the basement and duct tape her to a chair, and kill her if she did not become pregnant as a result of the assault. The evidence supports a score of fifty points for OV 7.

Defendant also asserts error in the trial court's decision to score OV 8 at fifteen points. A trial court can score OV 8 at fifteen points only if a "victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). Here, there is evidence in the record that supports the trial court's scoring of OV 8. Defendant held the victim captive beyond the time necessary to commit the offense. Because the record contains some evidence to support the trial court's decision, we conclude the trial court did not err in scoring OV 8 at fifteen points. *Hornsby*, *supra* at 468.

Defendant also contests the trial court's decision to score OV 10 at five points. A trial court can score five points for this variable if "[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious." MCL 777.40(1)(c). The statutory definition of "exploit" under MCL 777.40(3)(b) is "to manipulate a victim for selfish or unethical purposes." The record contains numerous references to defendant physically overcoming the victim, who was under the influence of alcohol and marijuana when the assaults occurred. Under these circumstances, the trial court did not err in scoring five points for OV 10.

Defendant filed a supplemental brief in which he argues that when scoring the sentencing guidelines, the trial court relied on facts not encompassed by the jury's verdict, in violation of *Blakely v Washington*, 542 US \_\_\_\_; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Our Supreme Court has stated that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Claypool*, 470 Mich 715, 731 n 14 (opinion by Taylor, J.), 738-740 (opinion by Corrigan, C.J., concurring in part and dissenting in part), 741 (opinion by Cavanagh, J., concurring in part and dissenting in part), 744 (opinion by Weaver, J., dissenting in part and concurring in part), 744 n 1 (opinion by Young, J., concurring in part and dissenting in part); 684 NW2d 278 (2004). Accordingly, we find no error.

Defendant also argues that his sentence constitutes cruel and unusual punishment under the federal and state constitutions. Defendant acknowledges that his minimum sentence for his CSC convictions on the habitual offender second supplement falls within the statutory guidelines. A sentence within the guidelines range, or which is proportionate to the offense and the offender, does not constitute cruel or unusual punishment. *People v Drohan*, 264 Mich App 77, 91-92; 689 NW2d 750 (2004), *lv gtd* \_\_\_\_ Mich \_\_\_\_ (order entered 3/31/05). "When a trial court imposes a sentence within the recommended guidelines range of accurately scored sentencing guidelines, this Court must affirm the trial court's sentence." *People v Houston*, 261 Mich App 463, 472-473; 683 NW2d 192, *lv gtd* 471 Mich 913 (2004), citing MCL 769.34(10).

Affirmed.

/s/ Janet T. Neff  
/s/ Helene N. White  
/s/ Michael J. Talbot